stances and assess such damages as will not only compensate the injured party, but serve to warn and deter others from similar acts, and their verdict will be disturbed only, if they assess outrageously excessive damages.

The measure of damages finally in cases where the negligence results in death, is not uniform. The remedy being given by the statute, the rule and measure of damages depends on such statute. In some states pecuniary damages only may be recovered (*Penn. R. R. Co.* v. *Zellie*, 33 Penn. St. 318, 328, 329; *Penn. R. R. Co.* v. *Henderson*, 51 Penn. St. 315, 320), while others seem to allow exemplary damages (*Bowler* v. *Lane*, 3 Metc. (Ky.) 311, 318; *Murphy* v. *N. Y. & New Haven R. R. Co.*, 29 Conn. 496), and still others give a certain sum under certain circumstances, for instance Missouri.

In endeavoring to treat of all the principal points that arise in the subject spoken of in the foregoing pages, we were compelled to be brief, and have, perhaps, sometimes been obscure. But we hope that reference to the authorities cited will in such cases explain what is obscure.

CHRISTIAN KOERNER.

St. Louis, Mo.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

SECOND NATIONAL BANK OF LOUISVILLE v. NATIONAL STATE BANK, NEWARK, N. J.

The national banks have no lien upon shares of their capital stock for the security of the indebtedness of the owners and holders of such shares.

Where the owners of such shares assign them *bonâ fide*, in security for actual indebtedness, and give the creditor power to transfer such shares upon the books of the bank, it creates such a lien in favor of the creditor as will be protected under the Bankrupt Law of the United States.

Where, more than two years after the creation of such lien, proceedings in bankruptcy are instituted and prosecuted to final discharge of the debtor without any notice being taken by the assignee or the court of the indebtedness or the assignment of such shares in security, such discharge of the debtor will have no effect upon the lien created by the assignment, and the assignee may compel, in a court of equity, the perfecting of his title to the shares so assigned upon the books of the bank.

The present Bankrupt Law leaves it optional with the assignee in bankruptcy whether or not to pursue property of the bankrupt which has been pledged or mortgaged for the security of the bankrupt's debts. If he is of opinion that anything may be saved to the estate by paying the debt so secured and taking the property

pledged or mortgaged, it is his duty to do so; but if he thinks otherwise, he should abstain from the redemption of the property, and in such case, unless the creditor claim to have the property pledged or mortgaged applied upon the debt, and to prove his claim for the balance, or to surrender the property to the assignee and prove for his whole debt, there is no occasion to bring the matter into the proceedings in bankruptcy. The pledgee or mortgagee of property, not brought into the proceedings in bankruptcy, may pursue his remedy upon the pledge or mortgage in the state courts, the Federal courts having no exclusive jurisdiction over property of the bankrupt which is not brought into the proceedings against him.

In the year 1866, Spencer Scott, who was then the owner of one hundred and seventy shares of the capital stock of the Second National Bank of Louisville, and who was largely indebted to the National State Bank of Newark, New Jersey, delivered to said last-named bank, as a security for his indebtedness, the certificate of his ownership of the stock in the Louisville bank. At the time of delivery he signed the blank form of transfer printed on the back of the certificate. He afterwards borrowed other sums of money on the faith of this security, and finally the Newark bank, pursuant to its authority in the premises, filled up the printed form of transfer, which now reads as follows:—

"For value received, I hereby assign and transfer to the National State Bank of Newark, New Jersey, all the shares of the within-mentioned stock, and do hereby constitute and appoint V. Rose, attorney to transfer the same on the books of the bank. Witness my hand this third day of October 1866.

SPENCER SCOTT.

Attest, RICHARD SCHELL."

In March 1868, Rose, the attorney, applied to appellant to be allowed to make the stipulated transfer, but permission was refused, upon the ground, as claimed by appellant, that it held a lien on the shares of stock so transferred, to secure the payment of certain indebtedness from Scott to it. Subsequent to all this Scott filed his petition in the District Court of the United States for the District of New Jersey, and was adjudged a bankrupt, and upon final hearing, was discharged from the payment of all debts provable under the Bankrupt Act. To this proceeding appellee was not made a party. It was not reported as a creditor of Scott, nor was the bank-stock in its hands, reported as part of the estate of the bankrupt. So far as the record showed it had no notice of the proceedings in bankruptcy, further than might be implied from the publications made pursuant to sections 14 and 29 of the Bankrupt Act.

In May 1870, appellee brought its suit in equity in the Louisville Chancery Court, to compel the appellant to transfer upon its books the shares of stock named in the certificate, in accordance with the assignment on the back thereof, and to account for the dividends that had accrued on such shares of stock subsequent to the 3d day of October 1866. As matter of defence, appellant averred want of knowledge or information as to Scott's indebtedness to the Newark Bank, and as to the assignment or transfer of the certificate of stock. Both these facts were satisfactorily established by the evidence in the case.

Bijur & Davie and *Lee & Rodman*, for the Second National Bank.

Gazlay & Reinecke, for the National State Bank.

The opinion of the court was delivered by

LINDSEY, J.—It is intimated that the arrangement between Scott and the appellee was fraudulent, but as there is no direct or specific charge of fraud the argument of counsel touching such intimation need not be further noticed.

Appellant alleges that in 1866, when the transfer of the certificate of stock is claimed to have been made, and at all times after that date, and up to the filing of Scott's petition in bankruptcy, he was indebted to it in an amount greatly exceeding the value of all the stock standing on its books in his name, and that under and by virtue of its articles of association and by-laws, it held a lien on said stock to secure the payment of all debts due and owing by Scott.

It also alleges that it appeared in the Bankrupt Court and proved its said debts and asserted its lien, and that it was recognised and upheld by said court. And further, that by agreement with the assignee it was allowed to retain all the stock standing in Scott's name, by crediting its debts by the agreed value thereof, and that this arrangement or agreement was reported to and approved by the court, and therefore that it holds the stock entirely freed from the claim of appellee, or of any one else.

As a second general ground of defence, appellant insists that the discharge granted to Scott extinguished appellee's debts, and that as a necessary result its security was also extinguished, and it also claims that, by reason of appellee's failure to appear in the

Bankrupt Court and assert its lien, it has forfeited all right to hold the stock as a security for its debts, and that it can now have no relief at the hands of a state court.

The claim of the Louisville Bank to a lien on the stock, under and by virtue of its articles of association or by-laws, cannot be maintained. This question is settled beyond all controversy by the two cases of the *Bank* v. *Lanier*, 11 Wall. 369, and *Bullard, Trustee*, v. *The National Eagle Bank*. No banking association organized under the National Currency Act of 1864 can create or hold such liens.

If, therefore, appellant can hold the stock, under a claim of title in itself, it must have acquired its title independent of such supposed lien. Its claims of ownership must be supported by its contract or agreement with the assignee of Scott, or by some order or judgment of the Bankrupt Court.

An inspection of the record of the proceedings had in the Bankrupt Court in the matter of Spencer Scott developes the fact that said court did not sell, nor attempt to sell, the stock in controversy, and did not, directly or indirectly, determine that appellant's lien on such stock was valid and enforceable. The assignee reported to the court that the Second National Bank of Louisville claimed a lien on this, as well as all other stock standing on its books, in the name of Scott, and that its debts against the bankrupt amounted in the aggregate to more than the value of all such stock. Upon the filing of this report, the Register was directed to ascertain the validity and amount of all claims against the estate of the bankrupt, and how much they, or any of them, should be reduced on account of the creditors holding securities of any kind. The Register ascertained the amount of appellant's claims, and deducted therefrom the value of certain bank-stock, including the stock in controversy, because, as he said, "said bank claims a lien under their by-laws" on such stock. Upon reading this report, the court ordered that it be confirmed and approved in all things, and that the assignee should procced to settle and distribute the bankrupt's estate upon the basis suggested by the Register.

The validity of appellant's pretended lien was not called in question, and no order or judgment relating thereto was made or rendered. The court did not direct a sale of the stock, and hence appellant cannot hold title to it as a purchaser from the court. The assignee, not deeming it his duty to enter into a contest with

appellant, exercised the power conferred on him by the 20th section of the Bankrupt Act, and by agreement with appellant ascertained the value of the stock, and deducted such value from the amount of its claims against the bankrupt's estate. That agreement was made out of court, and of course invested appellant with no other or greater title than the assignee could lawfully dispose of. The powers of that officer are in no sense judicial, and his acts bind only those whom he represents. In the sale of the estate of a bankrupt he acts only for the creditors who prove their claims, and in such matters he can conclude the rights of no one else.

Appellee did not prove its debts against Scott. It was not made a party to the bankrupt proceedings. It was not called on by the assignee, or by any creditor, to assert its lien on the stock in the Bankrupt Court. Its rights, therefore, were not affected by any act of the assignee. Such being the case, the claim of appellee cannot be resisted, unless by its failure to prove its debts and assert its lien in the bankrupt proceedings it forfeited a right acquired through a contract honestly made, and fully and completely executed months before Scott filed his petition in bankruptcy. It is insisted with earnestness and zeal that appellee's interest in the bank-stock was thus lost. We are referred to cases which seem to support this construction of the various provisions of the Bankrupt Act. Among others, the cases of *Davis, assignee* v. *Carpenter*, 2 N. B. Reg. 391, and *In re Snedaker*, 3 N. B. Reg. 629.

It is to be observed, however, that in each of these cases the secured creditor was required by the assignee to come into the Bankrupt Court and submit the validity of his debt, and the ascertainment and liquidation of his lien, to its adjudication. The courts have asserted no greater jurisdiction in matters of bankruptcy than that they had power to afford the relief asked, and when they assumed to decide that in cases of bankruptcy liens upon or specific claims to portions of the bankrupt's estate must *ex necessitate* be enforced in the Bankrupt Court, they were outside of the cases before them, and their decisions are not, therefore, entitled to the same consideration as though they had been rendered upon questions directly in issue. But aside from this, we are persuaded that the doctrine thus seemingly announced is contrary to the spirit and intention of the Bankrupt Act, and in conflict with the decided weight of authority.

The Bankrupt Act provides for the preservation of liens and se-

curities of almost all descriptions. The bankrupt courts are empowered, when called on by a party in interest, to ascertain and liquidate all liens and other specific claims on the property of the bankrupt, and for that purpose may compel all parties holding liens or asserting claim to any portion of the bankrupt's estate to appear before them, and submit said liens or claims to their adjudication. But because they have this jurisdiction it by no means follows that they must necessarily exercise it in all cases. The 20th section of the act provides that "where a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct;" "or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption thereon on receiving such excess, or *he may sell the property* subject to the claim of the creditor thereon, and in either case the assignee and creditor respectively shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold, or released and delivered up, the creditor shall not prove any part of his debt." From this section it is clear that the assignee who represents such creditors as prove their claims against the estate of the bankrupt is invested with the right, independent of the sanction of the court, to release to the secured creditor the bankrupt's right of redemption, or to sell the property subject to the claim of such creditor. If the creditor and the assignee cannot agree as to value of the property, or if the assignee entertains doubts as to the validity of the creditor's debt, he may by petition in the bankrupt proceedings have the property sold by the judgment of the court, or he may require the creditor to establish the validity of his debt. But if he and the general creditors are satisfied that the debt is valid, and that the encumbered property is not of value more than sufficient to pay it, he may abandon all claim to such property and leave it to be subjected by the creditor holding the lien. In such a case, to ask the Bankrupt Court to assert its jurisdiction, and force the creditor to prove his claim,

would not only not add anything to the amount to be distributed among the unsecured creditors, but such a course might result in reducing the dividends to which they would otherwise be entitled.

In re Melone, 3 Nat. B. Reg., it was held that it is no part of the duty of the assignee to petition for the sale of encumbered property, unless he shall believe that such a sale will create a larger fund for distribution among the creditors generally than a sale made by the sheriff of a state, or by the mortgagee.

In re The Iron Mountain Company of Lake Champlain, 4 N. B. Reg. 645, Judge WOODRUFF says: "But where no advantage can result to the estate of the bankrupt, I see no reason why the court should interfere, when neither the assignee, nor any creditor, invokes such interference, and it appears without contradiction that the equity of redemption is of no value."

After further discussion, he proceeds: "Whether the property when sold in foreclosure shall produce one-half or only one-fourth of the amount of the mortgage, is not of the least moment. The claimants of the lien, by electing to pursue the mortgaged premises, will deprive themselves of any right to prove their debt in bankruptcy, for the deficiency, and in that view, it may be greatly for the interest of the general creditors, to permit such election to be carried into effect, and thereby enhance the dividends to be made to them." There are numerous cases, in which upon the petition of the assignee, or of a creditor, the bankrupt courts have enjoined and restrained secured creditors from proceeding to enforce their liens in the state courts, or from themselves selling the encumbered property, and compelled them to submit their claims and their securities to the jurisdiction of such courts, but we are apprised of no instance in which this has been done, when the debt was conceded to be valid, and the encumbered property was not of sufficient value to satisfy it. When in the exercise of the discretion left to the assignee and the general creditors, by the Bankrupt Act, they voluntarily abandon all claim to encumbered property, then the state courts may subject such property to the satisfaction of the creditor's claims and may afford him any relief touching such property as he would have been entitled to, if the proceedings in bankruptcy had never been instituted.

This court so held in the case of *Payne & Bro.* v. *Abel*, 7 Bush 344. It was so held by the Supreme Court of Vermont, in *Stoddard* v. *Locke*, 43 Verm. Rep. 574, and by the Supreme Court of Maine in the case of *Leighton* v. *Kelley*, 4 Nat. B. Reg. 472.

The jurisdiction of state courts to afford such relief, when the secured creditors are not restrained from seeking it by the bankrupt courts, is distinctly recognised by the United States District Court for California, *In re Davis*, 4 Nat. B. Reg. 723, and by Justice BRADLEY, of the Supreme Court, sitting as a Circuit Court, in the case of *Goddard* v. *Weaver*, 6 Nat. B. Reg. 440. In said case the bankrupt court was asked to set aside a sale of property under a mortgage made by a sheriff in Louisiana. The assignee failed to show that the act of the sheriff who was proceeding under the state laws, would materially affect the interests of the general creditors, and the judge held that the bankrupt court ought not to interfere, saying in language at once expressive and forcible, "I know of no authority which the assignee has to take property possessed by a bankrupt, except as bailee out of the sheriff's hand, without paying the debt, or seeking the aid of courts sitting in bankruptcy; and if the sheriff proceeds to sell, I am unable to see anything in the Bankrupt Act which renders void his acts, done after the commencement of proceedings in bankruptcy."

It seems perfectly manifest that the bankrupt courts are not invested by Congress with the sole and exclusive jurisdiction of a bankrupt property, and that the assignee and general creditors may, if they deem it to their interests, relinquish by non-action to a secured creditor the title to property upon which he holds a lien, and when they do so relinquish, the jurisdiction of the state courts to perfect or enforce the title thus acquired cannot be questioned.

It is just this character of title or claim that the Vice-Chancellor was called on to enforce in this case.

By the transfer of the certificate Scott passed to appellee at least the beneficial ownership of the stock. The delivery of the possession was as complete as the nature of the property pledged or sold admitted of, and the only defect in appellee's muniment of title was the non-transfer of the stock on the books of the Louisville Bank. This non-transfer is the consequence of the wrongful refusal by said bank when Rose, the attorney, applied to make the transfer in 1868. It cannot therefore avail it anything in this litigation.

Appellee's claims against Scott amounted, at the time of his discharge by the bankrupt court, to about $25,000—greatly more than the value of the bank-stock he had pledged to secure their payment.

These claims are proved to be genuine and valid. The bank-stock is bound for their payment.

Appellant, as a purchaser from the assignee in bankruptcy, is entitled to the stock only upon condition that it will redeem it by satisfying the debts for which it is pledged.

It has not appeared to do so, and therefore it cannot complain that the Vice-Chancellor has adjudged that it shall perfect and recognise appellee's title, and account to it for the dividends that have accrued on the stock since it had notice of the transfer.

As appellant claims to be, and is, the holder of all the title to the stock passed by the assignment to Scott's assignee, Scott and his said assignee are only nominal parties to the action, and that was no reason why the Vice-Chancellor should not proceed to judgment, they being properly in court upon constructive service of process.

The judgment appealed from is affirmed.

The points of law stated in the foregoing opinion seem so well settled by the decisions and so clear upon principle that we need scarcely stop to discuss them. The rule in bankruptcy has been long well settled that the mortgagee or pledgee of any portion of the bankrupt's property, whether real or personal, might elect to stand aloof from the proceedings in bankruptcy, unless the register elected to pay his debt and bring the property into the proceedings, in order to save the excess above the pledge or mortgage for the general creditors, or he may apply the value of his pledge or mortgage upon the debt and then prove for the balance of his debt, or he may prove for his whole debt, first surrendering to the assignee the property pledged or mortgaged. These rights of the pledgee or mortgagee are subject to certain qualifications under special provisions of the Bankrupt Act, which are very clearly and very fully stated in the opinion, which upon the whole scope of the law embraced within its range affords a valuable commentary, and cannot fail to be of interest to the profession.

We have taken the liberty elsewhere, (3 Wills 356 *et seq.*), to call in question the entire justice of the rule in bankruptcy restricting the right of the pledgee or mortgagee to prove for his whole debt, irrespective of the amount secured upon it. No doubt, during the life and solvency of the debtor, the pledgee or mortgagee may demand judgment against him for the full amount of the debt without applying the security, or in any way impairing it. And it has seemed to us that the mere decease of the debtor and the settlement of his estate in insolvency, ought not to impair the remedies of the creditor as they existed before the decease. And in 3 Wills 358–360, and notes 19–21, we have reviewed the authorities with the view of maintaining, as far as practicable, the reasonableness of this view. But it is apparent that the English rule, both in bankruptcy and in equity, is that which we have before stated, that the pledgee or mortgagee must rely upon his security, or else apply the amount of it and then go against the general estate for the balance, unless he elect to surrender his security and prove his whole debt against the estate. This subject is discussed in *Ex parte Smith*, 2 Rose 63, in bankruptcy, and in *Green-*

wood v. *Taylor*, 1 Russ. & My. 185; *Mason* v. *Bogg*, 2 My. & Cr. 443, 448, in equity. See also *Barker* v. *Smark*, 3 Beav. 64. There are many other cases in equity passing upon the general question, which we have cited 3 Wills 358, n. 17, 21), but as there is no controversy in regard to the rule in bankruptcy we abstain from further comment. We ought, perhaps, to say that, upon further reflection, we are more disposed to question the equity of the rule for which we contend in our work on Wills before referred to, and which prevails in Vermont and some other states, that of allowing the creditor whose debt is partially secured to prove his whole debt and take a dividend thereon, and then hold his security for the balance: *Duncan* v. *Fish, Adm.*, 1 Aikens 231; *Walker* v. *Barker*, 26 Vt. 718; *Putnam* v. *Russell*, 17 Id. 54. There is certainly great plausibility, and perhaps justice, in regarding the debt as entirely cancelled to the extent of the security.

I. F. R.

Supreme Court of Illinois.

ILLINOIS CENTRAL RAILROAD CO. *v.* THOMAS GODFREY.

If the track of a railroad be used by persons for their own purposes, no right of way over its ground as a public thoroughfare for people to walk upon will be acquired, merely because the company do not see fit to enforce its right and put people off its premises. Neither will the company be bound to protect or provide safeguards for persons so using its grounds for their own convenience.

Where the plaintiff is himself in the wrong, or not in the exercise of a legal right, or is at the time enjoying a privilege or favor granted without compensation or benefit to the party granting it, and of whose carelessness complaint is made, he, the plaintiff, must use extraordinary care before he can complain of the negligence of another.

As a general rule it is culpable negligence to cross the track of a railroad at a highway-crossing without looking in every direction that the rails run to ascertain whether a train is approaching.

APPEAL from Macon county. The facts sufficiently appear in the opinion of the court, which was delivered by

SHELDON, J.—This cause was tried in the court below and submitted to the jury as manifested by the instructions given and refused, upon an erroneous theory, which was, that from the fact of the citizens of Decatur having been in the habit of passing and repassing over the portion of defendants' right of way where the injury in question occurred, the plaintiff had acquired some right which affected the defendant's situation toward him, and that at the time of the accident, he was in the exercise of a legal right. It very materially affects the question of the respective duties and liabilities of the parties, whether at such time the plaintiff was in the exercise of a legal right or not.